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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

KAYSER-ROTH CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

ANDREW J. PINCUS
Counsel of Record
KATHERINE J. HENRY
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

DEMING E. SHERMAN
Edwards & Angell
2700 Hospital Trust Tower
Providence, RI 02903
(401) 274-9200

Counsel for Petitioner
Kayser-Roth Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Section 107(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(a)(2), provides that a person who "at the time of disposal of any hazardous substance owned or operated" the facility at which the hazardous substance was disposed is liable for, among other things, the costs of cleanup in the event the hazardous substance is released into the environment.

The question presented is whether Congress intended to hold a parent corporation directly liable as an "operat[or]" of a facility owned and operated by one of its subsidiaries when the corporate veil between the parent and its subsidiary may not be pierced.

RULE 29.1 STATEMENT

Petitioner Kayser-Roth Corporation's parent corporation is Wickes Companies, Inc., whose parent corporation is WCI Holdings Corporation. The parent of the latter corporation is WCI Holdings II Corporation. Kayser-Roth Corporation has no subsidiaries other than wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Kayser-Roth Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 910 F.2d 24. The order of the court of appeals denying the petition for rehearing (App., *infra*, 30a-31a) is not reported. The opinion of the district court (App., *infra*, 9a-27a) is reported at 724 F. Supp. 15.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1990, and the petition for rehearing was denied on August 24, 1990 (App., *infra*, 30a-31a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(20)(A) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601(20)(A), provides:

> The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section * * * (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, * * * shall be liable for—
>
> (A) all costs of remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs

of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

STATEMENT

A. Statutory Background

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, in response to concern about improper disposal of hazardous substances. The statute authorizes the federal government and the states to arrange for the removal of hazardous substances that have been released into the environment and to take action to remedy any harm to the environment. Governmental entities may undertake these remedial actions themselves or allow private parties to clean up sites for which they are responsible. 42 U.S.C. § 9604; see also *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273, 2277 (1989) (citation omitted) ("CERCLA both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination").

If the government performs the remedial action, it is authorized to recover its expenditures from the private parties who are responsible for such costs under the liability scheme established by CERCLA. 42 U.S.C. § 9607. These parties include (1) present owners and operators of the "facility" from which the hazardous substances were removed; (2) owners and operators of the facility at the time of the disposal of the hazardous substances; (3) persons who generated the hazardous substances disposed of at the facility; and (4) persons who transported the hazardous substances to the facility. Responsible parties are strictly liable for the cleanup costs incurred by the government. See 42 U.S.C. §§ 9601(32), 9607.

B. The Stamina Mills Facility

Stamina Mills, Inc., owned and operated a textile plant in the Village of Forestdale in the Town of North Smithfield, Rhode Island, between 1952 and 1975.[1] The evidence showed that in 1969 Stamina Mills installed a dry cleaning system for use in cleaning newly-produced textiles; that system used trichloroethylene (TCE) as a cleaning agent. When a delivery of TCE was being unloaded in or about November 1969, the truck driver accidentally spilled a quantity of TCE at the Stamina Mills site. App., *infra*, 10a. The district court noted "credible evidence" of other TCE discharges at the site. *Id.* at 25a.

Three years earlier, in 1966, Stamina Mills had been acquired by petitioner Kayser-Roth Corporation. From that time until its dissolution in December 1977, Stamina Mills was a wholly-owned subsidiary of Kayser-Roth. App., *infra*, 11a-12a.[2] There is no dispute that Stamina Mills and Kayser-Roth maintained separate corporate identities. Stamina Mills at all times had its own officers and directors and complied with other corporate formalities. Title to the textile plant was held by Stamina Mills. And the individuals who ran the plant on a day-to-day basis were all employees of Stamina Mills. See, *e.g.*, App., *infra*, 14a; C.A. App. 287-325, 838-839, 847, 990, 1401, 1563, 1614.

During the time that it owned Stamina Mills, Kayser-Roth had more than 100 separate subsidiaries. In order to oversee its subsidiaries' operations, Kayser-Roth organized them into between 20 and 25 divisions. A subsidiary's officers reported to the president of its division, who in turn reported to one of the two vice-presidents of Kayser-Roth. Stamina Mills was part of Kayser-

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[1] A textile factory had been located on the site since 1824.

[2] The principal products manufactured during this period were woolen interlinings, blankets, and melton cloth. C.A. App. 103-105.

Roth's "Crown Division." App., *infra*, 12a; C.A. App. 642, 644, 646-647.

The district court found that "Kayser-Roth and its Crown Mfg. Division exerted practical total influence and control over Stamina Mills' operations. Kayser-Roth required Stamina Mills, after obtaining Crown Mfg. Division's approval, to obtain Kayser-Roth's approval in almost all its activities including purchase or movement of capital assets; leasing, buying, or selling real estate; borrowing money; and its budgets." App., *infra*, 13a. Thus, "Kayser-Roth essentially was in charge in practically all of Stamina's operational decisions, including those involving environmental concerns. * * * The only autonomy given the officers of Stamina Mills was that absolutely necessary to operate the facility on-site from day to day such as hiring and firing hourly employees and ordering inventory." *Id.* at 13a-14a.

C. The Proceedings Below

In May 1988, the United States commenced this action against Kayser-Roth in the United States District Court for the District of Rhode Island pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), seeking to recover costs incurred in responding to the release of trichloroethylene at Stamina Mills' Forestdale site.[3] The government also sought a declaratory judgment that Kayser-Roth was liable for all future costs incurred in responding to that release.[4]

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[3] The remedial measures performed by the Environmental Protection Agency included cleaning up the Stamina Mills site and taking steps to protect the drinking water used by residents in the area. App., *infra*, 11a.

[4] The complaint also named Hydro-Manufacturing, Inc., the present owner of the land on which the textile plant was located; and George Mann and Co., Inc., which allegedly delivered trichloroethylene to Stamina Mills. The government and Hydro-Manufacturing entered into a consent decree prior to trial and the claims against George Mann and Co. were dismissed.

The district court entered judgment in favor of the government. App., *infra*, 9a-27a. The court stated that "[a] parent corporation that controls the management and operations of its wholly owned subsidiary can be held responsible for its subsidiary's CERCLA liability without piercing the corporate veil." *Id.* at 17a. Kayser-Roth could be held liable as the "operator" of the facility, the court asserted, if Kayser-Roth "exercised control over Stamina Mills management and operations sufficient to find that Kayser-Roth was a de facto operator." *Id.* at 21a. The court found this standard satisfied on the basis of "Kayser-Roth's practical total control over Stamina Mills' operations" together with "Kayser-Roth's participation in Stamina Mills' environmental decision-making." *Id.* at 22a.[5]

The court of appeals affirmed. App., *infra*, 1a-8a. It stated that "CERCLA allows a parent corporation to be held liable as an operator of a subsidiary corporation." *Id.* at 5a. The court declined to "decid[e] the exact standard necessary for a parent to be an operator." *Ibid.* It stated that "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary." *Ibid.* The court concluded that the district court's findings established that Kayser-Roth exercised the requisite degree of control over Stamina Mills. *Id.* at 5a-7a.

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[5] The district court further concluded that Kayser-Roth could be held liable as an "owner" under CERCLA on the ground that the corporate veil between Stamina Mills and Kayser-Roth could be pierced. The court again observed that "Kayser-Roth has exhibited overwhelming pervasive control over Stamina Mills." App., *infra*, 24a. It stated that "Stamina Mills' veil should be pierced to hold Kayser-Roth liable, not only because public convenience, fairness, and equity dictate such a result, but also due to the all encompassing control which Kayser-Roth had over Stamina Mills as, in fact and deed, an owner." *Id.* at 25a. The court of appeals declined to address the correctness of that determination. *Id.* at 8a n.11.

REASONS FOR GRANTING THE PETITION

There is no dispute that Stamina Mills would have been strictly liable under CERCLA as both "owner" and "operator" of the Rhode Island facility.[6] The question here is whether Stamina Mills' corporate shareholder is also subject to liability as an "operator"—even though operational functions were performed by employees of Stamina Mills—on the theory that the shareholder exercised control over the operations of Stamina Mills. Questions regarding the liability of a parent corporation (or other shareholder) for the acts of its subsidiary traditionally are decided by application of the doctrine of "piercing the corporate veil." The test—which may include as one (but only one) of several factors the extent of the parent's "control" of the subsidiary's operations—was not applied by the First Circuit in this case. The court instead concluded that Congress had imposed "direct" liability on parent corporations that "control" their subsidiaries.

The First Circuit's decision disrupts the well-settled principle of limited shareholder liability and, more importantly, is inconsistent with the very language of CERCLA: Congress elsewhere in the statute expressly imposed liability in limited circumstances on persons who "controlled" activities at a facility. Congress's failure to include such a test in the definition of "operator" applicable here makes clear that Congress did not authorize any "short-cut" for imposing liability on parent corporations; the applicable test is the traditional veil-piercing standard.

Moreover, the First Circuit's decision conflicts with the Fifth Circuit's recent decision in *Joslyn Manufacturing*

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[6] The government argued in the district court that Kayser-Roth should be held liable as the successor to the dissolved Stamina Mills, Inc., but the district court declined to address that "thorny issue." App., *infra*, 21a. That question accordingly is not before this Court.

Co. v. *T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), petitions for cert. pending, 59 U.S.L.W. 3058 (U.S. July 24, 1990) (No. 89-1973) & 59 U.S.L.W. 3077 (U.S. Aug. 7, 1990) (No. 90-69), which squarely rejects the control test adopted by the First Circuit (see 893 F.2d at 83).[7] In addition, because of the vast scope of the CERCLA program, and the uncertainty and disruption of settled expectations in the business community that will result from the First Circuit's decision, the question presented in this case is one of tremendous practical importance. Review by this Court is therefore clearly warranted.

I. A CORPORATE PARENT MAY BE HELD DIRECTLY LIABLE AS THE "OPERAT[OR]" OF A FACILITY OWNED AND OPERATED BY ONE OF ITS SUBSIDIARIES ONLY IF THE CORPORATE VEIL BETWEEN PARENT AND SUBSIDIARY MAY BE PIERCED.

1. CERCLA provides that any person who "owned" or "operated" a facility when hazardous substances were disposed of at the facility is liable for, among other things, the costs of cleanup or removal in the event the hazardous substances are released into the environment. 42 U.S.C. § 9607(a)(2); see also 42 U.S.C. § 9601(23), 24. The statute defines "owner or operator" as follows:

> in the case of an onshore facility or an offshore facility, any person owning or operating such facility. * * * Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A)(ii).

The statutory definition leaves no doubt that the person or entity that directly holds title to a "facility"—essentially a site on which any hazardous substance is

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[7] This Court on October 1, 1990, issued an order inviting the Solicitor General to express the views of the United States in *Joslyn*. See 111 S. Ct. 34.

located (see 42 U.S.C. § 9601(9))—and the person or entity that directly operates the facility are subject to liability. For example, assume the owner of an empty building leases that building to another who operates an auto repair shop on the premises. Both individuals would be subject to liability under CERCLA in the event hazardous substances were deposited on the site as a result of the operation of the repair shop.

There is no claim here that Kayser-Roth itself held title to the Stamina Mills facility. All indicia of ownership were held by Stamina Mills, a different corporate entity. Similarly, there is no claim that employees of Kayser-Roth performed operational functions at the facility. All of the persons who worked at the facility were employees of Stamina Mills and responsibility for day-to-day operations was in the hands of Stamina Mills employees. See page 4, *supra*. Rather, the argument here is that Kayser-Roth, *by closely supervising the actions of its subsidiary*, controlled the operations of the facility.

The general rule, of course, is that "a corporation and its stockholders are deemed separate entities." *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 442 (1934); see also *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932); 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 25 (1990). For that reason, the actions and liabilities of a corporation generally may not be attributed to its shareholders. 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 25. Under this general rule, Kayser-Roth could not be held liable for the acts of Stamina Mills and its employees.

There are exceptions to this principle of limited liability, however. "[T]he corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook Railroad Co.*, 417 U.S. 703, 713 (1974). The law has long recognized that a parent's involvement in its subsidiary's activities may subject the

parent to liability for the subsidiary's actions. The standards for "piercing the corporate veil" are designed to identify those situations in which the line between parent and subsidiary has become so blurred that the two companies should be treated as one. See generally 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 43. When those standards are satisfied, the subsidiary's actions and liabilities may be imputed to the parent.

Indeed, courts have held that this is a permissible basis for imputing a subsidiary's CERCLA liability to its parent corporation, although there is some disagreement as to the appropriate veil-piercing standard. See, *e.g.*, *Joslyn Corp.* v. *T.L. James & Co.*, 696 F. Supp. 222, 226-227, 232-233 (W.D. La. 1988), aff'd, 893 F.2d 80 (5th Cir. 1990), petitions for cert. pending, 59 U.S.L.W. 3058 (U.S. July 24, 1990) (No. 89-1973) & 59 U.S.L.W. 3077 (U.S. Aug. 7, 1990) (No. 90-69) (holding veil piercing improper on the facts of the case under both federal common law and state law standard); *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22 (D. Mass. 1987) (applying federal common law standard in concluding that corporate veil should not be pierced).

The court of appeals did not hold Kayser-Roth liable on a veil-piercing theory.[8] The court found it unnecessary to address that question (see App., *infra*, 8a n.11), concluding instead that Kayser-Roth was "directly liable" (*id.* at 3a) as "operator" of the Stamina Mills facility because of its assertedly close relationship with its subsidiary. As we have discussed, however, any involvement by Kayser-Roth occurred in the course of routine oversight of the activities of its subsidiary. The court's linguistic sleight-of-hand cannot disguise what the court was really doing: disregarding corporate formalities and

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[8] The district court did find liability proper on this ground, but the court of appeals did not address Kayser-Roth's challenges to that determination. See page 6 note 5, *supra*.

treating the two corporations as one. The question in this case, therefore, is whether Congress intended to supplement the traditional veil-piercing exception to the principle of limited liability by creating an additional ground for the imposition of liability on corporate shareholders.

Congress may of course choose to expand a parent corporation's liability for its subsidiary's acts by, for example, imposing liability whenever a parent corporation "controls" its subsidiary, without regard to whether liability would obtain under the applicable standard for piercing the corporate veil. For example, a financial institution's liability under certain federal banking laws extends to all "commonly controlled" institutions. See 12 U.S.C. § 1815(e)(1)(A). The statutory definition of "control" includes holding 25% of a company's voting stock, controlling the election of a majority of the board of directors, or "directly or indirectly exercis[ing] a controlling influence over the management or policies of the bank or company." 12 U.S.C. § 1841(a)(2)(C). Similarly, the Employee Retirement Income Security Act, 29 U.S.C. § 1301 *et seq.*, extends an individual employer's liability under the statute to all businesses under "common control" (29 U.S.C. § 1301(b)(1)), with control defined as ownership of 80% or more of a company's stock. A wholly-owned subsidiary's liability would therefore automatically be imputed to its parent corporation.

Congress's failure to include a similar express "control" standard in the relevant portion of CERCLA weighs strongly against expanding the liability of corporate shareholders. As the Fifth Circuit observed with respect to this precise issue, "[t]o [hold parents directly liable under CERCLA for their subsidiaries' activities] would dramatically alter traditional concepts of corporation law. The 'normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that

intent specific.' Any bold rewriting of corporation law in this area is best left to Congress." *Joslyn Manufacturing Co.*, 893 F.2d at 82-83 (quoting *Midlantic National Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 501 (1986)). The Fifth Circuit concluded that "[w]ithout an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court's analysis." 893 F.2d at 83.

More than Congress's silence establishes that Congress did not intend to create a new principle of shareholder liability here, however. Congress included in another part of CERCLA the "control" test that the court of appeals read into the definition of "operator" and applied to Kayser-Roth. In the very next subsection of the definition of "owner or operator," Congress specially defined that term with respect to facilities conveyed to state or local governments by bankruptcy, tax delinquency or abandonment; the definition reads: "any person who owned, operated, *or otherwise controlled* activities at such facility immediately" before its conveyance. 42 U.S.C. § 9601 (20)(A)(iii) (emphasis added).

"'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' Had Congress intended to [subject all shareholders of owners and operators to liability under CERCLA on a 'control' theory], it presumably would have done so expressly as it did in the immediately following subsection * * *." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citations omitted). This Court has repeatedly rejected the argument that "differing language in * * * two subsections has the same meaning in each," refusing to "ascribe this difference to a simple mistake in draftsmanship." *Ibid.*; see also *United States* v. *Monsanto*, 109 S. Ct. 2657, 2664 (1989); *United States*

v. *Naftalin*, 441 U.S. 768, 773-774 (1979). Congress's failure to include such an express control test in the general definition of owner or operator thus weighs strongly against the court of appeals' construction of the statute. *Joslyn Manufacturing Co.*, 893 F.2d at 83.

Moreover, the express control test in Section 9601 (20) (A) (iii) would be unnecessary if, as the First Circuit concluded, such a standard was incorporated within the general meaning of "operator." The inclusion of this language in the latter provision is thus "an express acknowledgment of Congress' background understanding" that such a test is *not* included within the general definition of operator. *Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273, 2278 (1989) (applying this principle in interpreting CERCLA).

In sum, the very text of the statute, especially when read against the background of the general legal principles governing limited shareholder liability, establishes that a parent corporation may not be held directly liable as an owner or operator under Section 9601(20) (A) (ii) on the theory that the parent controlled the activities of its subsidiary.

2. The court of appeals asserted that the plain language of the statute supported its decision because neither the statutory language nor the legislative history indicated that Congress intended to exclude parent corporations from the definition of "operator." App., *infra*, 4a. But the court's approach turns a settled principle of statutory construction on its head. As we have discussed, because of the long-established principle of limited liability, the proper inquiry is whether Congress intended to overturn that rule. "Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute; it is most improbable that it would have been made without even any mention in the legislative history." *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365,

380 (1988) (citation omitted). Moreover, the structure and language of the statute make clear that Congress did *not* intend to subject parent corporations to a new category of liability.

The First Circuit also stated (App., *infra*, 4a) that its interpretation of the statute is supported by decisions of other courts. But most of the decisions that the court cited involve the quite different issue of the personal liability of a *corporate officer* for actions taken on behalf of the corporation. Thus, in *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), the question was whether a plant supervisor could be held liable for cleanup costs under the provision of CERCLA imposing liability on "any person" who arranged for the disposal or transportation for disposal of hazardous substances. See 42 U.S.C. § 9607(a)(3). The supervisor (who was also a stockholder in the company) was the corporate employee who arranged for the disposal of the hazardous substances. The court stated that he could "be held individually liable because he personally participated in conduct that violated CERCLA; this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" 810 F.2d at 744.

The supervisor argued that he could not be held liable because he had acted solely as an employee of the corporation that owned the hazardous waste. The court rejected the argument, applying the general rule that "'[a] corporate officer is individually liable for the torts he [or she] personally commits [on behalf of the corporation].'" 810 F.2d at 744 (citation omitted). *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985), involved precisely the same situation. Neither case involved the liability of a *separate corporation* and neither therefore involved the principle of limited liability and the absence of a "control" test from the statutory defini-

tion of "owner or operator." These decisions accordingly provide no support for the decisions below.[9]

* * * *

We do not argue that a parent corporation may never be held liable for the acts of its subsidiary. Such liability is entirely proper whenever the applicable standard for piercing the corporate veil is satisfied. The court of appeals' error was in holding that Congress intended to create a new type of shareholder liability in addition to that long-settled exception to the principle of limited liability. The decision below accordingly cannot stand. On remand, the First Circuit will be free to consider Kayser-Roth's liability under the appropriate veil-piercing rule.[10]

II. THE FIRST CIRCUIT'S INTERPRETATION OF CERCLA SQUARELY CONFLICTS WITH THE FIFTH CIRCUIT'S DECISION IN *JOSLYN MANUFACTURING CORP.*

Joslyn Manufacturing Corp. involved the very question decided by the First Circuit in the present case: whether a parent corporation may be an "owner or operator" of a facility directly owned and operated by its subsidiary. Indeed, the Fifth Circuit stated the question as whether to "hold parents directly liable [under CERCLA] for their subsidiaries' activities." 893 F.2d at 82.

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[9] The other appellate decision cited by the First Circuit—*United States* v. *Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), petition for cert. pending, 59 U.S.L.W. 3332 (U.S. Oct. 30, 1990) (No. 90-504)—involved the entirely different question of the liability of a mortgagee.

[10] In our view state law supplies the governing veil-piercing standard. We submit that the facts relied on by the district court would not be sufficient to subject Kayser-Roth to liability under Rhode Island law. *Miller* v. *Dixon Industries Corp.*, 513 A.2d 597 (R.I. 1986); *Alterio* v. *Biltmore Constr. Corp.*, 377 A.2d 237 (R.I. 1977).

The Fifth Circuit held in *Joslyn* that CERCLA does not subject parent corporations to liability on this basis. The court observed that "CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law." 893 F.2d at 82. The court concluded that "Congress is quite capable of creating statutes that hold shareholders or controlling entities liable for the acts of valid corporations. In fact, Congress adopted a 'control' test in the next subsection of [CERCLA]. * * * No such 'control' test appears in subsection (ii), the subsection at issue in this case, and we will imply none." *Id.* at 83.

The First Circuit acknowledged that "there is some broad language in *Joslyn* that might support Kayser's position," but asserted that the Fifth Circuit's decision was distinguishable on the ground that it was concerned "primarily with owner rather than operator liability." App., *infra*, 5a. This distinction does not withstand analysis.

Joslyn expressly addressed both "owner" and "operator" liability. The court consistently referred to both categories of liability in describing the scope of its decision. See 893 F.2d at 82, 83. Indeed, the *amicus* brief filed by the United States in *Joslyn* pressed the precise theory of "direct" liability as an "*operator*" that the First Circuit adopted in this case. U.S. Am. Br. 15-25.[11] The government "urge[d]" the Fifth Circuit to establish a standard holding a parent corporation "directly liable" under CERCLA if it "participat[ed] in * * * operating a hazardous substance facility or vessel." Br. at 22-23.

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[11] The government observed (Br. at 22) that the district court in *Joslyn* had "apparently rejected this theory of direct liability, because the court viewed it as significantly reducing the protection that parent corporations otherwise are accorded by the doctrine of the corporate veil."

Under such a standard, "a parent corporation is directly liable when its officers, directors, or employees, in the ordinary course of their activities in these roles," engaged in "routine operational decisionmaking." *Id.* at 23, 24. The government argued that the case should be remanded to allow the district court to apply that standard because the facts in *Joslyn* might be sufficient to establish the parent corporation's direct liability as an operator. *Id.* at 24-25. The Fifth Circuit expressly rejected the government's theory as a basis of liability.[12]

In sum, the question presented here plainly would have been decided the opposite way had this case arisen in the Fifth Circuit. This Court should grant the certiorari petition to resolve this clear conflict among the courts of appeals.

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[12] The First Circuit also relied (App., *infra*, 5a) on what it characterized as the interpretation of *Joslyn* adopted by the district court in *Riverside Market Development Corp.* v. *International Building Products*, No. 88-5317, 1990 U.S. Dist. LEXIS 6375 (E.D. La. May 23, 1990). But that court did not distinguish *Joslyn* on the ground suggested by the First Circuit. *Riverside Market* presented a question about the personal liability of a corporate officer for acts performed in his official capacity. The district court characterized *Joslyn* as a case in which "the Fifth Circuit refused to extend CERCLA liability to parent corporations for the acts of their subsidiaries absent some evidence that the corporate veil had been pierced. Mov[ants] would have this Court extend Joslyn to cover corporate officers as well." Slip op. at *9 (citation omitted). The court declined to take that step observing that "even though the district court opinion in Joslyn contained dicta about corporate officer liability, the Fifth Circuit confined itself to the issue of parent/subsidiary liability. Accordingly, *Joslyn is clearly distinguishable; there is no parent/subsidiary issue here.*" *Id.* at *9-*10 (footnote omitted; emphasis added). The district court's distinction of *Joslyn* thus provides no support whatsoever for the line drawn by the First Circuit: the district court instead affirmed that *Joslyn* governs questions of parent/subsidiary liability such as that decided by the First Circuit in this case.

III. THE GROUNDS ON WHICH A PARENT CORPORATION MAY BE HELD LIABLE UNDER CERCLA FOR ACTS OF ITS SUBSIDIARY IS A QUESTION OF GREAT PRACTICAL IMPORTANCE.

The scope of a parent corporation's liability under CERCLA for its subsidiary's acts is a question of tremendous practical importance. The dimensions of the CERCLA cleanup program are truly vast. The National Priority List—which identifies those facilities posing the greatest danger to public health and the environment (see 42 U.S.C. § 9605(a)(8))—now contains 1,200 sites. 40 C.F.R. § 300 App. B. The Office of Technology Assessment has predicted that the Priority List will eventually contain 10,000 sites.[13] The Environmental Protection Agency has estimated that the average cleanup cost for a site is almost $20 million. 54 Fed. Reg. 33846, 33850 (1989). The total cleanup cost for the Priority List sites will therefore be more than $100 billion.

The government clearly will attempt to recover as much of this expense as possible from the parties subject to liability under CERCLA. The vast majority of the potentially liable parties will be corporations and, because the corporate structure of most companies includes several subsidiaries,[14] questions regarding the liability of parent corporations under CERCLA are likely to continue to arise with great frequency.

The conflict among the courts of appeals—and the murky "control" standard adopted by the First Circuit in this case—create considerable uncertainty regarding the extent to which parent corporations may be held liable under CERCLA. Most parent corporations exercise

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[13] Office of Technology Assessment, U.S. Congress, *Coming Clean: Superfund Problems Can Be Solved* 125 (Oct. 1989).

[14] In one study, 120 American corporations were found to have a total of 5,894 subsidiaries; that is an average of 50 subsidiaries per corporation. P. Blumberg, *The Law of Corporate Groups* 464-470 (1983).

at least as much control over their subsidiaries' operations as did Kayser-Roth here. The First Circuit's standard would therefore impose liability on the parent corporation in virtually every case, a revolutionary change from the traditional principle of limited liability.

Furthermore, this question is not important just because it will continue to be the subject of litigation. Given the enormous amount of potential liability under CERCLA, the routine imposition of liability on the parent corporation cannot help but have an adverse impact on the way businesses operate. A parent corporation would be foolish not to consider restructuring its operations to avoid liability for the actions of its subsidiaries, even though inefficiencies might result from the decrease in corporate coordination. Indeed, the First Circuit's emphasis on Kayser-Roth's involvement in Stamina Mills' environmental decisions (App., *infra*, 6a) might well encourage parent corporations to take a hands-off attitude with respect to such issues, hardly the approach most likely to foster strict compliance with environmental laws. And, because the confusion over the governing rule makes it impossible to quantify the level of risk, investors—be they individuals or acquiring corporations—cannot be certain of the liabilities that they might be taking on when they acquire new companies. That uncertainty can only tend to deter otherwise-desirable commercial ventures.

This Court should grant the petition in order to eliminate the disruptive effects flowing from the confusion that now plagues both the courts and the business community with respect to this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
KATHERINE J. HENRY
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

DEMING E. SHERMAN
Edwards & Angell
2700 Hospital Trust Tower
Providence, RI 02903
(401) 274-9200

Counsel for Petitioner
Kayser-Roth Corporation

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 90-1190

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE

v.

KAYSER-ROTH CORP., INC.,
DEFENDANT, APPELLANT

Appeal from the United States District Court
for the District of Rhode Island
[Hon. Francis J. Boyle, *U.S. District Judge*]

Before Breyer, *Chief Judge*, Bownes, *Senior Circuit Judge*, and Selya, *Circuit Judge*.

August 2, 1990

BOWNES, *Senior Circuit Judge*. Kayser-Roth Corporation (Kayser) appeals from a decision by the district court of Rhode Island holding it liable as both an "owner" and "operator" for the cleanup costs incurred

by the Environmental Protection Agency in response to a spill of trichloroethylene (TCE) at the Stamina Mills textile plant (the site). Stamina Mills, Inc. (Stamina), the nominal owner of the site, was a wholly owned subsidiary of Kayser prior to Stamina's dissolution in 1977.[1] The government has sought to recover its cleanup costs from Kayser under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (CERCLA), based on direct liability (Kayser as operator of the site) and indirect liability (Kayser as owner by "piercing the corporate veil"). Kayser argues that the parent company of a dissolved subsidiary cannot, as a matter of law, be held liable on either ground. We disagree, and affirm on the basis that Kayser is liable as an operator.

CERCLA was enacted in response to the increasing concern about the vast problems of the disposal of and contamination from hazardous waste throughout the country. It is a remedial statute designed to protect and preserve public health and the environment. Because CERCLA is a remedial statute,

> we . . . construe its provisions liberally to avoid frustration of the beneficial legislative purpose. With this in mind, we join the Second Circuit in proclaiming that 'we will not interpret section 9607 (a) in any way that apparently frustrates the statute's goals.'

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (*quoting New York v. Shore Realty*, 759 F.2d 1032, 1045 (2d Cir. 1985)) (Dedham I).

The Act empowers the government to use money from the "superfund" to clean up hazardous waste sites. 42

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[1] A detailed description of the corporate structure can be found in the district court opinion. *United States v. Kayser-Roth Corporation*, 724 F. Supp. 15 (D.R.I. 1990).

U.S.C. § 9604(a). Any "person" who is the "owner" or "operator" of a facility at the time of the disposal[2] of a hazardous substance shall be liable for, among other things, all of the costs of removal or other remedial action incurred by the United States. 42 U.S.C. § 9607 (a)(2). Liability for the cost incurred is strict[3] and joint and several.[4]

I.

We begin our discussion with the issue of whether a parent corporation may be held directly liable as an operator. "Operator" is defined circularly in the statute as any person[5] operating a facility.[6] 42 U.S.C. § 9601 (20)(A)(ii).[7] Congress, by including a liability cate-

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[2] At oral argument, Kayser argued that the spill was an accident and thus not "disposal" under CERCLA; but spilling is explicitly part of the statutory definition. *See* 42 U.S.C. § 9601(29) (referring to 42 U.S.C. § 6903(3)).

[3] *See, e.g., Dedham Water Company v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989) (Dedham II); *New York v. Shore Realty*, 759 F.2d 1032, 1042 (2d Cir. 1985) (reviewing cases and legislative history on liability).

[4] *See, e.g., O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1135 (1989).

[5] The statute defines "person" extremely broadly and certainly includes a parent corporation. 42 U.S.C. § 9601(21). Kayser does not seriously contest that it is a person within the meaning of the statute.

[6] Owner liability is similarly circular with the additional explicit limitation that when the ownership interest is primarily a security interest without participation in the management of the facility the owner is not liable for cleanup costs. 42 U.S.C. § 9601(20)(A)(iii). That exclusion indicates that if limited owners participate in management, they may be held liable. *Shore*, 759 F.2d at 1052; *see also United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (owner through security interest can be held directly liable if actively involved in management).

[7] 42 U.S.C. § 9601(20)(A) provides:

> The term "owner or operator" means . . . (ii) in the case of an onshore facility or an offshore facility, any person owning

gory in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability. In addition, the legislative history provides no indication that Congress intended "all persons" who are "operators" to exclude parent corporations. *Shore*, 759 F.2d at 1044 (reviewing congressional intent and determining that the final version of the statute "imposed liability on classes of persons without reference to whether they caused or contributed to the release or threat of release"). Thus, our analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA.

Our decision is supported by the interpretation given "operator" by other courts. *See, e.g., United States v. Northeastern Pharmaceutical*, 810 F.2d 726, 743-744 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (individual liability under § 9607(a)(3)); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986) (parent corporation liable as operator). For example, the majority shareholder of a corporation has been held individually liable as an operator under CERCLA. *Shore*, 759 F.2d at 1052. In addition, a corporation that was an owner through holding a security interest and became active in the management of the corporation has been held liable. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990).

We are unpersuaded by the case upon which Kayser relies most heavily to support its position. *Joslyn Mfg.*

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or operating such facility, and (iii) . . . . Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990). Although there is some broad language in *Joslyn* that might support Kayser's position, the opinion is concerned primarily with owner rather than operator liability. The *Joslyn* court framed its issue as whether to "impose direct liability on parent corporations for the violations of their wholly owned subsidiaries." *Joslyn*, 893 F.2d at 81. On the theory of the case presently under consideration, Kayser is being held liable for *its* activities as an operator, not the activities of a subsidiary. Our reading of the *Joslyn* case is bolstered by a fifth circuit district court's narrow interpretation of the *Joslyn* case. *Riverside Market Devel. Corp. v. International Building Products*, 1990 U.S. Dist. LEXIS 6375 (E.D. La. 1990) (distinguishing *Joslyn* and following *Shore Realty* and *Northeastern Pharmaceutical* in holding individual liable as operator and noting that in *Joslyn* there was no participation by parent in activities of subsidiary).

In sum, we believe that a fair reading of CERCLA allows a parent corporation to be held liable as an operator of a subsidiary corporation.

II.

We now examine whether the district court correctly held that Kayser was an operator. This determination is reviewed only for clear error. *See Lynch v. Dukakis*, 719 F.2d 504, 513 (1st Cir. 1983). Without deciding the exact standard necessary for a parent to be an operator, we note that it is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary. To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary.

The district court's excellent opinion found that "Kayser-Roth . . . exerted practical total influence and

control over Stamina Mills' operations." *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 18 (D.R.I. 1989). The court summarized the evidence as follows:

> Kayser-Roth exercised pervasive control over Stamina Mills through, among other things: 1) its total monetary control including collection of accounts payable; 2) its restriction on Stamina Mills' financial budget; 3) its directive that subsidiary-governmental contact, including environmental matters, be funneled directly through Kayser-Roth; 4) its requirement that Stamina Mills' leasing, buying or selling of real estate first be approved by Kayser-Roth; 5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than $5000; and finally, its placement of Kayser-Roth personnel in almost all Stamina Mills' director and officer positions, as a means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out.

Id. at 22. Kayser's control included environmental matters including the approval of the installation of the cleaning system that used the TCE.[8] The district court found

> Kayser had the power to control the release or threat of release of TCE, had the power to direct the mechanisms causing the release, and had the ultimate ability to prevent and abate damage. Kayser-Roth knew that Stamina Mills employed a scouring system that used TCE; indeed [it] approved the installation of that system . . . [and] was able to direct Stamina Mills on how the TCE should have been handled.

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[8] Although indicia of ability to control decisions about hazardous waste are indicative of the type of control necessary to hold a parent corporation liable as an operator, we do not think the presence of such indicia is essential, assuming there are other indicia of the pervasive control necessary to prove operator status.

Id. Such control is more than sufficient to be liable as an operator under CERCLA.

Kayser argues vehemently that it was blameless for the spill, which was caused by a third party and was not brought to Kayser's attention until years later.[9] Kayser misunderstands CERCLA. Under this strict liability statute, all that it is necessary to prove is that Kayser was an operator at the time of the spill. Although CERCLA includes a limited affirmative defense that the spill was caused by a third party, that defense does not help Kayser because it only applies if the third party was not in a contractual relationship with the operator, which was not the case here. 42 U.S.C. § 9607(b)(3).[10]

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[9] The government contests Kayser's statement that it didn't know of the spill for years. We do not take a position on this factual issue.

[10] 42 U.S.C. § 9607(b) provides that:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> . . .
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Based on the record, we find that the district court did not err in finding that Kayser was an operator and in holding it liable for the cost of the cleanup.[11]

AFFIRMED

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[11] Because we decide that the district court was not clearly erroneous in finding that Kayser was an operator, we do not need to consider the various arguments advanced regarding Kayser's liability as a owner.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

C. A. No. 88-0325B

UNITED STATES OF AMERICA, PLAINTIFF

v.

KAYSER-ROTH CORPORATION, DEFENDANT

OPINION

BOYLE, Francis J., Chief Judge.

In the somnolent village of Forestdale, Rhode Island, the ground waters run deep. Unfortunately, the waters also contain pollutants. Having long been home to machining and textile manufacturing industries, Forestdale found itself a victim of its own hospitality. Trichloroethylene, sometimes a by-product of those industries, had filtered into Forestdale's private and public residential water wells. The Government alleges that Stamina Mills, Inc., a defunct textile operation, was a source of the contaminant.

In a slight twist on a biblical passage, the Court in this case must also decide whether the sins of the son should be visited upon the father. *Cf.* Exodus 20:5. Specifically, the issue is whether Kayser-Roth Corporation, the parent corporation and sole shareholder of Stamina Mills, Inc., is responsible for clean-up and response costs generated at least in part by a spill of a hazardous sub-

stance on its subsidiary's property in 1969. The answer to that query requires not only a journey through the labyrinth of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), but thorough examination of the relationship between the related corporations as well.

FACTS

Release and Response

Stamina Mills, Inc. was a textile manufacturing operation in North Smithfield, Rhode Island from approximately 1952 to 1975. The mill building had been on the site since some time in the last century. It is located on the north side of the Branch River. The Branch River flows west to east at the site. The company employed a soap scouring system to remove oil and dirt from newly-woven fabric. Because of complaints involving discharge into and pollution of the Branch River, Stamina Mills replaced the soap scouring system with one that used trichloroethylene ("TCE") in March 1969. Tanker trucks delivered the TCE which was pumped into a storage tank. During one delivery before November 1969, a mishap occurred; a tanker driver improperly attached a hosing coupling and spilled an indeterminate number of gallons of TCE. In addition to this accidental release of TCE, there is evidence that Stamina Mills would deposit used quantities of TCE bottoms in a landfill on its property. One witness, a Rhode Island Department of Health employee, testified that he saw a truck back up to the landfill and dump a purplish fluid with oily texture. The same witness also stated that the odor of TCE emanated from Stamina Mills' building.

In August 1979, ten years after Stamina Mills began to use TCE, the Rhode Island Department of Health conducted a survey of drinking water supplies in the Forestdale area, which is generally north and northwest of the Stamina property. The survey found that residential

wells north of the Stamina Mills site had elevated levels of TCE. In September 1982, the Environmental Protection Agency ("EPA") completed a hydrogeological study of the area which concluded that the Stamina Mills site was a source of the contaminant. The study found a hydraulic connection between the Stamina Mills site and the residential wells. Although the flow of water through the bedrock aquifer was from north to south, normal pumping of the residential wells would reverse the flow. Consequently, the site was added to the National Priorities List the following September, making Superfund monies available for response actions.

There was evidence introduced that the residential wells might have been contaminated by sources other than Stamina Mills. The potential sources included Amperex and other companies that were located on the opposite bank of the Branch River south of the Stamina Mills site. There was no evidence that other sources did, in fact, contribute to the pollution. The EPA did not investigate potential sources of contamination other than Stamina Mills.

The EPA conducted remedial measures at both the Stamina Mills site and the residential wells. The parties have stipulated that the EPA incurred $660,612.71 in costs related to removal and enforcement activities. In addition, the parties have agreed that the Department of Justice (DOJ) spent $185,879.62 for enforcement activities. The record fails to reflect any distinction between costs related to "on-site" clean-up (at the Stamina Mills site) and "off-site" clean-up (at the residential wells).

Corporate Relationships

Stamina Mills, Inc. has expired. Its parent corporation, or more accurately, the parent's successor,[1] remains

[1] Since the expiration of Stamina Mills, Inc., Kayser-Roth has been involved in a merger; immediately after the merger, however, the new entity was renamed Kayser-Roth Corporation.

in the form of the Kayser-Roth Corporation. Before Stamina Mills' dissolution, the two corporations shared a common history.

In 1961, Crown Textile Manufacturing Company ("Crown") and Samuel M. Staymen each owned 50% of the shares of Stamina Mills. Three years later Crown merged into Colonial Corporation of America ("Colonial"), and a new subsidiary of Colonial, Crown Textile Mfg. Co. ("Crown Mfg."), was incorporated and organized to run the business of Crown. Colonial retained the 50% stock interest in Stamina Mills.

In 1965, Colonial acquired Samuel M. Staymen's shares, thus becoming the sole stockholder of Stamina Mills. The following year Colonial merged with Kayser-Roth; Kayser-Roth was the surviving corporation. Kayser-Roth was therefore the owner of all the capital stock of both Crown Mfg. and Stamina Mills. Both subsidiaries, along with many other corporations, were part of Kayser-Roth's "Crown Division", a designation created for internal organization purposes only. Kayser-Roth remained the sole stockholder of Stamina Mills until its dissolution on December 31, 1977. Pursuant to the dissolution plan, Kayser-Roth received Stamina Mills' assets and assumed "all liabilities and obligations" of Stamina Mills. *See* Plaintiff's Exhibit No. 53 (Resolution of Stamina Mills' shareholders).

As might well be expected, the two corporations shared common officers nominated and appointed by Kayser-Roth. The common officers of Kayser-Roth and Stamina Mills included:

	KAYSER-ROTH	STAMINA MILLS
Norman A. Jackson	Financial Vice-President 1966-75	Financial Vice-President 1966-75
James I. Spiegel	President 1976-83	Vice-President 1976-77
Harold L. Glasser	Vice-President and Secretary 1966-81	Vice-President and Secretary 1966-77

P. J. McNichol	Treasurer 1966-71	Asst. Treasurer 1966-71
Robert Zimring	Treasurer 1971-75	Asst. Treasurer 1971-77
Norman S. Beier	Vice-President and Asst. General Counsel 1975-83	Asst. Secretary 1976-77

Moreover, and probably of greater significance, Kayser-Roth and Stamina Mills shared common directors, again nominated and appointed by Kayser-Roth, including Chester H. Roth, Alfred P. Slaner, Norman A. Jackson, Harold L. Glasser, David J. Roth, and James I. Spiegel. These individuals were officers of Kayser-Roth at the time they were also directors of Stamina Mills.

Kayser-Roth and its Crown Mfg. Division exerted practical total influence and control over Stamina Mills' operations. Kayser-Roth required Stamina Mills, after obtaining Crown Mfg. Division's approval, to obtain Kayser-Roth's approval in almost all its activities including purchase or movement of capital assets; leasing, buying, or selling real estate; borrowing money; and its budgets. The fiscal operations were completely in the control of Kayser-Roth including accounting supervision, payment of bills, collection of accounts receivable and executive compensation. Stamina Mills' officers did participate in union negotiations but this was simply a bargaining ploy since Kayser-Roth had to approve the ultimate collective bargaining agreement. Three former presidents of Stamina Mills each testified that they played little or no role in major decisions affecting Stamina Mills, except with respect to the local details of operating the factory. Kayser-Roth essentially was in charge in practically all of Stamina's operational decisions, including those involving environmental concerns. Kayser-Roth made the ultimate decision to acquire the dry cleaning process using TCE. Moreover, Kayser-Roth issued a directive requiring Stamina Mills to notify the Kayser-Roth Legal Department of any correspondence with

courts or governmental agencies regarding environmental matters. The only autonomy given the officers of Stamina Mills was that absolutely necessary to operate the facility on-site from day to day such as hiring and firing hourly employees and ordering inventory. Stamina was in fact and effect the serf of Kayser-Roth.

LAW

CERCLA, enacted in 1980, allocates responsibility for the clean-up of releases and threatened releases of hazardous materials into the environment. 42 U.S.C. § 9601-9675.[2] A responsible party is strictly, jointly and severally liable for costs incurred for removal or remedial action as well as for damages for injury to or loss of natural resources. *Id.* at § 9607(a). *Cf. O'Neil v. Picillo*, No. 88-1551 slip op. at 5-6 (1st Cir. 1989) (damages apportioned only if defendant demonstrates harm divisible). Because CERCLA liability is strict, a party will be held responsible upon proof that: (1) a release or threat of a release of a hazardous substance occurred; (2) the government or other authorized party incurred response costs as a result of the release, and (3) the party falls into one of the four categories of responsible parties. *Id.* The four categories are: (1) the current owner or operator of the site; (2) any former owner or operator of the site at the time of the release or threatened release; (3) a transporter of hazardous materials which are released; and (4) a generator of hazardous waste. *Id.* The Government claims that Kayser-Roth and Crown Mfg. were owners and operators of Stamina Mills at the time of the TCE release.

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[2] CERCLA as initially enacted encompassed 42 U.S.C. §§ 9601-9657. In 1986, the Superfund Amendments and Reauthorization Act (SARA) was passed, which provided additional funding and repealed certain sections while adding certain other sections. *See* 95 Pub.L. No. 99-499, 100 Stat. 1613 (1986). The statute, as amended, now comprises 42 U.S.C. §§ 9601-9675.

CERCLA's definition of "owner or operator" is not especially illuminating. In terms of an expanded definition, it states that "in the case of an onshore facility . . ., any person owning or operating such facility" qualifies as an owner or operator. 42 U.S.C. § 9601(20)(A)(ii).[3] The term "person" expressly includes corporations. *Id.* at § 9601(21). CERCLA does provide that the term "owner or operator" does not include "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." *Id.* at § 9601(20)(A). Courts have generally concluded that these provisions confer a subsidiary's liability upon its parent in two situations. The first occurs when the parent dominates the subsidiary to such an extent that the corporate form ought to be ignored and the corporate veil pierced. The second situation takes place where a stockowner participates directly in the management of a facility, although not to the extent that allows a piercing of the corporate veil.

CHOICE OF LAW

As a preliminary matter, the Court must resolve which law to apply. It is firmly established "that when a federal statute is silent as to the choice of law to be applied, but overriding federal interests exist, courts should fashion uniform rules of decision." *United States v. Nicolet*, 712 F. Supp. 1193, 1201, (E.D. Pa. 1989) (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943)). CERCLA, by promoting environmental protection, certainly seeks to further an overriding federal interest. One court has noted in terms that are logically overwhelming that:

> [i]n attempting to eliminate the dangers of hazardous wastes, CERCLA presents a national solution

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[3] The term "facility" is defined at 42 U.S.C. § 9601(9). The parties have stipulated that Stamina Mills was a facility.

> to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection. Congress did not intend that the ability of the executive to fund the clean up of hazardous waste sites should depend on the attitudes of the several states toward parent-subsidiary liability in general, or CERCLA in particular. The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend on the particular state in which a defendant happens to reside.

In re Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 31 (D. Mass. 1987). Accordingly, a uniform federal rule of decision should be applied in CERCLA cases involving *alter ego* liability.

Courts framing a federal rule concerning the piercing of the corporate veil in CERCLA cases have isolated a number of factors. These factors include:

> (1) inadequate capitalization in light of the purposes for which the corporation was organized, (2) extensive or pervasive control by the shareholder or shareholders, (3) intermingling of the corporation's properties or accounts with those of its owner, (4) failure to observe corporate formalities and separateness, (5) siphoning of funds from the corporation, (6) absence of corporate records, and (7) nonfunctioning officers or directors.

Id. at 33. The presence or absence of any particular factor, however, is not dispositive. The general rule is that "'a corporate entity may be disregarded in the interest of public convenience, fairness and equity.'" *Alman v. Danin*, 801 F.2d 1, 3 (1st Cir. 1986) (quoting *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974)); *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (quoting *Capital Tel. Co. v. FCC*, 498 F.2d

734, 738 (D.C. Cir. 1974)). The factors simply add flesh to that proposition.

Not surprisingly, this federal common law borrows heavily from state law. Hence, these considerations do not radically differ from Rhode Island law. *See, e.g., Miller v. Dixon Indus. Corp.*, —— R.I. ——, ——, 513 A.2d 597, 604 (R.I. 1986) (to pierce the corporate veil "where a parent-subsidiary relationship is involved, it must be demonstrated that the parent dominated the finances, policies, and practices of the subsidiary"). Indeed, courts confronting this choice of law issue have observed that the distinction between state law and a federal rule of decision is of little practical difference. *In re Acushnet River*, 675 F. Supp. at 33.

Liability Without Piercing the Corporate Veil

A parent corporation that controls the management and operations of its wholly owned subsidiary can be held responsible for its subsidiary's CERCLA liability without piercing the corporate veil. *E.g., Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 671-72 (D. Idaho 1986). *Cf. New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (individual stockholder liable as operator); *United States v. Northeastern Phramaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986) (same). *But see Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222, 224-25 (W.D. La. 1988) (parent corporation cannot be held liable under CERCLA unless corporate veil is pierced). While courts have reached this conclusion by finding that the parent corporation was a de facto operator of the subsidiary, they have used two slightly different approaches.

One line of cases holds that a stockholder who manages the corporation may incur CERCLA operator liability. *Eg., Shore Realty*, 759 F.2d at 1052; *United States v. Northeastern Pharmaceutical and Chemical Co.*, 579 F.

Supp. 823, 848 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726 (8th Cir. 1986). These cases note that the definition of operator or owner excludes "a person, who without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his securing interest in the . . . facility." 42 U.S.C. § 9601(20(A). Reasoning that this exception implies that a person who holds indicia of a corporation's ownership and who participates in its management can be an owner or operator, the courts have concluded that stockholders participating in management can be liable. *Shore Realty*, 759 F.2d at 1052; *Northeastern Pharmaceutical*, 579 F. Supp. at 848.

Other cases support a second theory. A stockholder, parent corporation, or any person associated with a facility whether he or she has any ownership interest or not, may be held liable if that person (including a corporate entity) controls the management and operation of the polluting corporation. This approach focuses primarily on control.

Federal common law is emerging to determine whether a parent corporation, individual stockholder, or sister subsidiary for that matter, may be held directly liable as an operator. *See Northeastern Pharmaceutical*, 810 F.2d at 743-44 (individual stockholder); *Shore Realty*, 759 F.2d at 1052 (individual stockholder); *Vermont v. Staco, Inc.*, 684 F. Supp. 822, 831 (D. Vt. 1988) (sister subsidiary); *Bunker Hill*, 635 F. Supp. at 672 (parent corporation). To be held directly liable as an operator, courts have considered a number of factors including: whether the person or corporation had the capacity to discover in a timely fashion the release or threat of release of hazardous substances; whether the person or corporation had the power to direct the mechanisms causing the release; and whether the person or corporation had the capacity to prevent and abate damages. *See Bunker Hill*, 635 F. Supp. at 671-72.

THEORIES OF LIABILITY

Stamina Mills is not a party to this action although it is clearly an owner and operator of a facility that released a hazardous substance into the environment. *Cf. Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448 (9th Cir. 1987) (affirming dismissal of CERCLA action brought against dissolved corporation). The United States, however, has proceeded against Stamina Mills' former parent corporation, Kayser-Roth. The Government argues no less than six different theories of liability.

First, the Government contends that Kayser-Roth, because of its control over Stamina Mills, was actually an operator of the site at the time of release. Second, the Government suggests that Crown Mfg. was an operator of the Stamina Mills site and that Kayser-Roth has assumed all of Crown Mfg.'s liabilities. Third, the Government contends that Kayser-Roth succeeded to the liabilities of Stamina Mills by continuing its operations. Fourth, the Government argues that Kayser-Roth implicitly and expressly assumed the liabilities of Stamina Mills. Fifth, the Government suggests that the corporate veil of Stamina Mills be pierced to find Kayser-Roth responsible for Stamina Mills' obligations. Finally, the Government contends that the same theory is available to hold Crown Mfg. liable for Stamina Mills' violations, and that Kayser-Roth is ultimately responsible because it assumed the liabilities of Crown Mfg.

Kayser-Roth denies that it should be held liable for the acts of Stamina Mills. Defendant avers that it and its subsidiary, Crown Mfg., did not own or operate the Stamina Mills site within the scope of the statute. With respect to Kayser-Roth's assumption of Stamina Mills' liabilities upon dissolution, Kayser-Roth posits that the General Laws of Rhode Island, Section 7-1.1-98, which provides that suits against dissolved corporations must be

brought within two years of the corporation's demise, protects it against a suit brought more than ten years after Stamina Mills' dissolution.

Moreover, Defendant rejects the theory that the veil of Stamina Mills ought to be pierced to pursue the real culprit. Defendant also contends that Amperex and other hazardous waste sites in the area were the actual sources of TCE contamination in the Forestdale wells.

ISSUES

The parties have stipulated to a number of material facts. Defendant has admitted that the 1969 spill of TCE occurred and that this constitutes a release. Furthermore, Defendant also admits that TCE is a hazardous material and that Stamina Mills qualifies as a facility under CERCLA. Finally, the parties stipulate as to certain response costs, although the division between on-site and off-site costs is disputed.

The parties disagree over two major issues. The first is whether Kayser-Roth can be held responsible for Stamina Mills' actions. The second involves causation: Defendant asserts that even if it is liable for Stamina Mills' release, the 1969 spill did not contaminate the residential wells. Rather, Defendant argues that other sources, including a company known as Amperex, are the actual polluters of the Forestdale wells and therefore Stamina Mills' release did not result in off-site response costs. Each issue will be addressed in turn.

DISCUSSION

Parent Liability: Parent as Operator

Ordinarily, a parent corporation cannot be deemed an operator based solely upon its status as a shareholder. The fact that the subsidiary was a member of the classes of persons potentially liable under CERCLA and that the parent had a substantial ownership interest in the subsidiary is insufficient to establish that the parent was an

operator for CERCLA's purposes. *Cf. Bunker Hill*, 635 F. Supp. at 672. The parent corporation's control over the subsidiary's management and operations is an essential element of proving operator liability on the parent's part. *See id. Cf. Shore Realty*, 759 F.2d at 1052; *Northeastern Pharmaceutical*, 810 F.2d at 744.

Kayser-Roth's liability as an operator turns on the issue of control. It is uncontroverted that Stamina Mills was within the class of those potentially liable under CERCLA. Similarly, it is undisputed that Kayser-Roth, as sole owner and shareholder of Stamina Mills, had a substantial financial and ownership interest in Stamina Mills. The question becomes whether Kayser-Roth exercised control over Stamina Mills management and operations suffiicent to find that Kayser-Roth was a de facto operator.

The evidence establishes that Kayser-Roth was indeed an operator for purposes of CERCLA.[4] Kayser-Roth exercised pervasive control over Stamina Mills through, among other things: 1) its total monetary control including collection of accounts payable; 2) its restrictions on Stamina Mills' financial budget; 3) its directive that subsidiary-governmental contact, including environmental matters, be funneled directly through Kayser-Roth; 4) its requirement that Stamina Mills' leasing, buying or selling of real estate first be approved by Kayser-Roth;

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[4] Because the Court finds Kayser-Roth responsible for any CERCLA liability of Stamina Mills on an operator theory and, as discussed later, a "piercing" theory, it need not address the thorny issue of whether Kayser-Roth, or Crown Mfg. for that matter, assumed, expressly or implicitly, the CERCLA liability of Stamina Mills at the time of its dissolution. Having dissolved prior to the statute's enactment in 1980, Stamina Mills' potential CERCLA liability was, of course, unknown at the time. *Cf. Great Am. Ins. Co. v. Byrd & Watkins Constr., Inc.*, 630 F.2d 460 (6th Cir. 1980) (upon corporation's dissolution, shareholders pledged to assume all liability, known or unknown, of corporation).

5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than $5,000; and finally, 6) its placement of Kayser-Roth personnel in almost all Stamina Mills' director and officer positions, as a means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out. These are only examples of Kayser-Roth's practical total control over Stamina Mills' operations.

Illustrative of Kayser-Roth's control are its actions with regard to environmental matters affecting Stamina Mills. Kayser-Roth had the power to control the release or threat of release of TCE, had the power to direct the mechanisms causing the release, and had the ultimate ability to prevent and abate damage. Kayser-Roth knew that Stamina Mills employed a scouring system that used TCE; indeed, Kayser-Roth approved the installation of that system after mandating that a cost-benefit study be made by Stamina Mills. Kayser-Roth not only had the capacity to determine the use of TCE but also was able to direct Stamina Mills on how the TCE should have been handled.[5] There are other examples of Kayser-Roth's participation in Stamina Mills' environmental decision-making. Evidence was introduced that Kayser-Roth issued a directive to its subsidiaries, including Stamina Mills, requiring that Kayser-Roth's Legal Department be notified of any governmental agency or court contact regarding environmental matters. Furthermore, when Stamina Mills was sued in 1974 by the United States for an illegal waste water discharge into the Branch River, the final decision on settlement was made by Kayser-Roth's directors.

Although not singularly determinative on the issue of operator liability, these factors along with Kayser-Roth's other acts of pervasive control over Stamina Mills, war-

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[5] Actual knowledge of the release is not required for CERCLA liability; CERCLA is a strict liability scheme. *O'Neil v. Picillo*, No. 88-1551, slip op. at 16 n.9 (1st Cir. Aug. 21, 1989).

rant a finding that Kayser-Roth was an "operator" for CERCLA purposes within the provisions of 42 U.S.C. § 9607(a).

Parent Liability: Piercing the Corporate Veil

CERCLA liability based upon piercing the corporate veil is a species of owner, rather than operator, liability. While an owner may be, in most cases, an operator, the converse is not necessarily true. Imputing CERCLA liability upon a parent corporation by piercing the corporate veil is, in essence, concluding that the parent is an owner for CERCLA's purposes. " 'The effect of piercing a corporate veil is to hold *the owner* . . . liable. The rationale for piercing the corporate veil is that the corporation is something less than a bona fide independent entity.' " *Northeastern Pharmaceutical*, 810 F.2d at 744 (quoting *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978)) (emphasis added). Upon analysis of the factors relevant to piercing Stamina Mills' veil, and mindful of the liberal construction CERCLA must be afforded so as not to frustrate probable legislative intent, the Court concludes that Kayser-Roth is an owner for CERCLA's purposes.

An analysis of piercing Stamina Mills' veil to hold Kayser-Roth liable begins with the general proposition that a corporate entity may be disregarded in the interest of public convenience, fairness and equity. As the First Circuit has stated:

> . . . [F]ederal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form . . . an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine. . . .

Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986) (quoting *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981)).

CERCLA's language attempts to address nationwide public health and environmental problems. In fashioning a remedial framework by which some of these problems could be resolved, Congress had two basic purposes in mind:

> First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982)). CERCLA's provisions should thus be viewed expansively, so as not to frustrate these "beneficial legislative purposes."[6] *Id.; Shore Realty*, 759 F.2d at 1045. It is against this backdrop that it is concluded that CERCLA places no special importance upon the corporate structure. *See United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988).

Kayser-Roth has exhibited overwhelming pervasive control over Stamina Mills. Many of the same factors used in holding Kayser-Roth liable as an operator are relevant. Kayser-Roth's control over environmental matters; its policy of approving all capital expenditures of greater than $5,000; its stranglehold on income and expenses; its practice of placing Kayser-Roth personnel in Stamina Mills' director positions, thereby precluding other Stamina Mills executives from significant daily

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[6] The *Dedham Water* court further stated that "'[W]e will not interpret section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise.'" *Dedham Water*, 805 F.2d at 1081 (quoting *New York v. Shore Realty*, 759 F.2d 1032, 1045 (2d Cir. 1985)).

decision-making; and its overwhelming control over Stamina Mills' financial and operational structure add flesh to the skeletal proposition that Kayser-Roth's corporate existence should be disregarded.[7] Accordingly, Stamina Mills' veil should be pierced to hold Kayser-Roth liable, not only because public convenience, fairness, and equity dictate such a result, but also due to the all encompassing control which Kayser-Roth had over Stamina Mills as, in fact and deed, an owner. Any other result would provide too much solace to deliberate polluters, who would use this device as an escape.

Causation

Kayser-Roth contends that even if it is liable for Stamina Mills' release of TCE, that release did not contaminate the Forestdale wells. Absent a causal connection between Stamina Mills' release and the Forestdale wells contamination, Kayser-Roth asserts it bears no responsibility for the off-site response costs. While there might be some doubt if the 1969 spill were the only release, it ignores the credible evidence of TCE being continually dumped on Stamina Mills' property. In the beginning, there were inordinately high concentrations of TCE on the Stamina Mills' property. There was ample evidence to support the fact that once dumped on Stamina Mills' property the TCE migrated to the Forestdale wells. A hydrogeological study established a hydraulic connection between the Stamina Mills site and the residential wells. The relationship between the concentration on the Stamina Mills' property and the plume overspreading the residential area clearly established that the Stamina Mills property is a source of pollution. *See* 42 U.S.C. § 9607(a). Thus, the releases from the Stamina Mills site were the cause of both the on-site and off-site response costs.

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[7] One version of the "Golden Rule" is that he who has the Gold rules. The circumstances comport completely with this version of the "Golden Rule."

Kayser-Roth also argues that other sources were responsible for the contamination of the residential wells. Specifically, Kayser-Roth accuses Amperex, a southern neighbor, of contributing to the pollution. This argument, however, ignores CERCLA's joint and several liability scheme. "[D]amages should be apportioned only if the defendant can demonstrate the harm is divisible." *O'Neil v. Picillo*, No. 88-1551, slip op. at 5-6 (1st Cir. Aug. 21, 1989). Kayser-Roth did not introduce any evidence concerning the divisibility of the TCE contamination. Indeed, on this record it is sheer speculation to suggest that there was any other source of TCE. There was evidence that Amprex used TCE but no evidence that its TCE migrated under the Branch River to the Stamina site or the Forestdale wells. In the absence of that evidence Kayser-Roth is itself liable for all on-site and off-site damages the Government has proven.

Damages

The parties stipulated to certain costs the Government incurred in a document titled "First Joint Stipulation As To Costs." Specifically, the parties agreed that costs incurred by the EPA totalling $660,612.71 were " 'costs of removal or remedial action' within the meaning of 42 U.S.C. § 9607(a)." First Joint Stipulation As To Costs 1-2. Moreover, it was stipulated that costs incurred by the Department of Justice totalling $185,879.62 were also " 'costs of removal or remedial action' within the meaning of 42 U.S.C. § 9607(a)." *Id.* at 2. The total costs the Government incurred and paid as a result of the release was therefore $846,492.33. As noted earlier, the record fails to reflect any distinction between on-site and off-site costs. Because Kayser-Roth is liable for both on-site and off-site costs, the distinction is immaterial.

Accordingly, Kayser-Roth is found liable for $846,492.33. In addition, the United States is entitled to recover interest from the later of the date of the written

demand for payment of a sum certain or the date of a particular expenditure. 42 U.S.C. § 9607(a). Finally, the Government shall within 10 days prepare and present a form of declaratory judgment holding Kayser-Roth liable for future response costs related to on-site and off-site clean-up. *Id.* at § 9613(g)(2).

SO ORDERED.

/s/ Francis J. Boyle
FRANCIS J. BOYLE
Chief Judge
United States District Court
District of Rhode Island

October 11, 1989.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 88-0325-B

UNITED STATES OF AMERICA

v.

KAYSER-ROTH CORPORATION and
HYDRO-MANUFACTURING, INC.

DECLARATORY JUDGMENT

This matter, which was initiated under Section 107 of the Comprehensive Environmental Response Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9607, was tried to the Court on July 17-21, 1989. The Court issued its Opinion and Order finding defendant Kayser-Roth Corporation to be an owner and operator of the Stamina Mills Site within the meaning of 42 U.S.C. § 9607(a)(2), on October 11, 1989. As part of that Opinion and Order, the Court found Kayser-Roth liable to the United States for $846,492.33 in past response costs incurred by the government related to the Stamina Mills Site, plus pre-judgment interest on that amount. Order at 27, 28. The Court also found Kayser-Roth liable for response costs related to future on-site and off-site cleanup. Order at 28; 42 U.S.C. § 9613(g)(2).

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED, that the United States recover of defend-

ant Kayser-Roth Corporation the sum of $846,492.33, with interest thereon at the rate provided in 42 U.S.C. § 9607(a), and 26 U.S.C. § 9501 et seq., in the amount of $11,927.76, totalling $958,420.09.

IT IS FURTHER ORDERED AND ADJUDGED, that defendant Kayser-Roth Corporation is liable to the United States, pursuant to 42 U.S.C. § 9607 (a)(2), for all further response costs incurred by the United States related to the Stamina Mills Site, which costs are not inconsistent with the National Contingency Plan (40 C.F.R. Part 300).

Entered this 18th day of January, 1990.

By Order,

/s/ Loriaine Kizior
Clerk

ENTER:

/s/ Francis J. Boyle
FRANCIS J. BOYLE
Chief Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 90-1190

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE

v.

KAYSER-ROTH CORPORATION, INC.,
DEFENDANT, APPELLANT

ORDER OF COURT

Entered August 24, 1990

The petition for rehearing is denied.

Kayser continues to argue that liability under CERCLA should be based on fault. It stresses the accidental or unintentional nature of the spill (Petition for Rehearing at 1, 2, 3, 5) and the "fact" that Kayser did not commit a "wrongful" act (Petition for Rehearing at 3, 5). It urges us to adopt a standard of operator liability based on wrongful disposal.

Kayser completely misunderstands CERCLA. Under the statute, if a person is an operator (Kayser was and we so held), that person is liable for the clean-up costs associated with any disposal of hazardous waste. It is completely irrelevant that the disposal was an accident; CERCLA is a strict liability statute.

Kayser takes issue with footnote 2 of the panel opinion. Although the footnote might be a little cryptic, it is correct and should remain. In discussing the footnote, Kayser illustrates its misunderstanding of CERCLA by conceding that there was "disposal" on the site.[1] That concession is fatal to Kayser because Kayser, as an operator, is liable if there was disposal. (Under 42 U.S.C. § 9607 (2) "any person who at the time of disposal of any hazardous substance owned or operated any facility . . ." is liable.)

By the Court:

/s/ Francis P. Scigliano
Clerk

[1] The footnote was responding to a slightly more sophisticated (but still wrong) argument that "disposal" does not include accidental spills.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 90-1190

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE

v.

KAYSER-ROTH CORPORATION, INC.,
DEFENDANT, APPELLANT

Before Breyer, *Chief Judge*, Campbell, Torruella, Selya and Cyr,*, *Circuit Judges.*

ORDER OF COURT

Entered: September 7, 1990

The panel of judges that rendered the decision in this case having denied the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing en banc be denied.

By the Court:

/s/ Francis P. Scigliano
Clerk

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* Circuit Judge David H. Souter did not participate.

(2)

No. 90-816

FILED
JAN 25 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

KAYSER-ROTH CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
RICHARD B. STEWART
Assistant Attorney General
ANNE S. ALMY
BRADLEY M. CAMPBELL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a parent corporation is liable under the Comprehensive Environmental Response, Compensation, and Liability Act for response costs resulting from the release of hazardous substances at a subsidiary corporation's facility where the parent participated in the operation of the facility.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-815

KAYSER-ROTH CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 910 F.2d 24. The opinion of the district court (Pet. App. 9a-27a) is reported at 724 F. Supp. 15.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1990, and a petition for rehearing was denied on August 24, 1990 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on November 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Kayser-Roth, Inc. was the corporate parent of a wholly owned textile subsidiary, Stamina Mills, Inc., from

1966 until the subsidiary's dissolution in 1977. The United States brought this action against Kayser-Roth, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover the government's expenditures in cleaning up contamination from releases of a hazardous substance, trichloroethylene (TCE), at the Stamina Mills site. The United States District Court for the District of Rhode Island entered a declaratory judgment holding Kayser-Roth liable for the government's past and future response costs at the site. Pet. App. 9a-29a. The court of appeals affirmed. *Id.* at 1a-8a.

1. CERCLA enhances the Environmental Protection Agency's (EPA's) authority to deal effectively with the release of hazardous substances into the environment. See generally *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989). Under Section 104(a)(1) of CERCLA, 42 U.S.C. 9604(a)(1), EPA may take direct "response" actions to abate any actual or threatened release of any hazardous substance. 42 U.S.C. 9604(a)(1). Congress has established the Hazardous Substance Superfund to pay for federal response actions. See 26 U.S.C. 9507. CERCLA provides that the federal government may bring cost recovery actions pursuant to Section 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A), to replenish the fund when EPA has expended money in performing response actions. Sections 107(a)(4)(B) and 113(f) of CERCLA also permit non-governmental parties to recover their necessary costs of response in certain circumstances. See 42 U.S.C. 9707(a)(4)(B); 42 U.S.C. 9613(f).

A party seeking recovery of response costs under CERCLA must establish four elements: (1) the defendant falls within one or more of the classes of liable persons described in Section 107(a); (2) the site is a "facility" as defined in Section 101(9); (3) a "release" or "threatened release" of a "hazardous substance" has occurred or is occurring; and (4) the release or threatened release has caused the party

to incur "response costs." 42 U.S.C. 9607(a). See, *e.g.*, *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 991-992 (D.S.C. 1984), aff'd *sub nom. United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 491 U.S. 600 (1989).[1]

As to the first of these four elements, CERCLA establishes four broad classes of liable persons: (1) the owners and operators of hazardous substance facilities and sites; (2) persons who owned or operated a facility at the time hazardous substances were disposed of at that facility; (3) persons who arranged for disposal or treatment of the hazardous substances; and (4) persons who transported the hazardous substances and selected the disposal facility. § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4). CERCLA defines the term "owner or operator" to include "any person owning or operating such facility," § 101(20)(A), 42 U.S.C. 9601(20)(A), and it defines the term "person" to include "an individual, firm, corporation, association, partnership, consortium, [or] joint venture," § 101(21), 42 U.S.C. 9601(21).

2. Kayser-Roth manufactures and markets textiles and other products. In 1966, Kayser-Roth acquired all of the capital stock of Stamina Mills, a textile manufacturer located on the Branch River in North Smithfield, Rhode Island. Kayser-Roth placed Stamina Mills within its Crown Division, a unit of Kayser-Roth's internal corporate organization, and retained Stamina Mills as a wholly owned

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[1] It is well settled that responsible parties are strictly liable under CERCLA. *E.g.*, *Monsanto*, 858 F.2d at 167; *Tanglewood East Homeowners* v. *Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985). In addition, they are jointly and severally liable when the environmental harm is indivisible. *E.g.*, *O'Neil* v. *Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990); *Monsanto*, 858 F.2d at 172; *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 810-811 (S.D. Ohio 1983).

subsidiary until Stamina Mill's dissolution on December 31, 1977. Upon dissolution, Kayser-Roth received Stamina Mills' assets and assumed "all liabilities and obligations" of the subsidiary. Pet. App. 10a-12a.

At the time Kayser-Roth acquired Stamina Mills, the company was using a soap-scouring system to launder newly woven fabrics. In 1969, at Kayser-Roth's direction, Stamina Mills abandoned that system and installed a dry-cleaning system that used the solvent TCE in place of soap. In November of that year, there was a substantial release of TCE during a tank truck delivery to the site. In addition, Stamina Mills evidently discarded used TCE in a landfill at the site. Pet. App. 10a.

In 1979, the Rhode Island Department of Health discovered that TCE had contaminated residential drinking water wells in the area surrounding the Stamina Mills facility. EPA later conducted hydrogeologic studies and concluded that Stamina Mills was the source of the contamination. The extent and toxicity of the contamination qualified the site for the National Priority List, an inventory of sites posing the most pressing need for governmental cleanup. See 42 U.S.C. 9605(8)(A); 40 C.F.R. 300.66(c) (1989). EPA began clean-up and the government incurred $846,492.33 in initial removal costs. Pet. App. 11a.

3. The United States brought a CERCLA cost recovery action against Kayser-Roth and two other defendants. The government asserted that Kayser-Roth was potentially liable based, among other matters, on its role as an operator of the Stamina Mills facility at the time that hazardous substances were disposed of at that site. § 107(a)(2), 42 U.S.C. 9607(a)(2). The district court held a five-day bench trial in July 1989 and determined, based on extensive testimony and other evidence, that Kayser-Roth was liable

under CERCLA as an operator of the Stamina Mills facility. Pet. App. 1a-27a.[2]

The district court stated that "[o]rdinarily, a parent corporation cannot be deemed an operator based solely upon its status as a shareholder." Pet. App. 20a.[3] Rather, the question was "whether Kayser-Roth exercised control over Stamina Mills management and operations sufficient to find that Kayser-Roth was a de facto operator." *Id.* at 21a. The district court stated:

> The evidence establishes that Kayser-Roth was indeed an operator for purposes of CERCLA. Kayser-Roth exercised pervasive control over Stamina Mills through, among other things: 1) its total monetary control including collection of accounts payable; 2) its restrictions on Stamina Mills' financial budget; 3) its directive that subsidiary-governmental contact, including environmental matters, be funneled directly through Kayser-Roth; 4) its requirement that Stamina Mills' leasing, buying or selling of real estate first be approved by Kayser-Roth; 5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than $5,000; and finally, 6) its placement of Kayser-Roth person-

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[2] The district court also concluded that "due to the all encompassing control which Kayser-Roth had over Stamina Mills" the separate corporate identities of Kayser-Roth and Stamina Mills should be disregarded. Pet. App. 25a. As a consequence, Kayser-Roth was also liable as an "owner" of the facility. *Ibid.* The court of appeals did not reach the question whether Kayser-Roth is liable under that theory (*id.* at 8a n.11), and Kayser-Roth does not seek review of that issue in its petition (see Pet. 6 n.5, 15 & n.10).

[3] See also Pet. App. 20a ("The fact that the subsidiary was a member of the classes of persons potentially liable under CERCLA and that the parent had a substantial ownership interest in the subsidiary is insufficient to establish that the parent was an operator for CERCLA's purposes.").

> nel in almost all Stamina Mills' director and officer positions, as a means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out. These are only examples of Kayser-Roth's practical total control over Stamina Mills' operations.

Id. at App. 21a-22a. See also *id.* at 12a-14a. The district court credited the testimony of three former Stamina Mills presidents "that they played little or no role in major decisions affecting Stamina Mills, except with respect to the local details of operating the factory." *Id.* at 13a. Instead, "Kayser-Roth essentially was in charge in practically all of Stamina's operational decisions, including those involving environmental concerns." *Ibid.* Thus, it was Kayser-Roth, rather than Stamina Mills, that selected the TCE cleaning system that led to the release and consequent response costs. *Id.* at 22a. The court also cited "other examples of Kayser-Roth's participation in Stamina Mills' environmental decision-making." *Ibid.*

The court concluded that while "not singularly determinative on the issue of operator liability, these factors along with Kayser-Roth's other acts of pervasive control over Stamina Mills, warrant a finding that Kayser-Roth was an 'operator' for CERCLA purposes within the provisions of 42 U.S.C. § 9607(a)." Pet. App. 22a-23a.

4. The court of appeals affirmed the district court's judgment, rejecting Kayser-Roth's argument that a parent corporation "cannot, as a matter of law, be held liable" (Pet. App. 2a) for environmental hazards at a dissolved subsidiary. The court first observed that CERCLA imposes liability on any "person" who "owned" or "operated" a facility at the time that hazardous substances were disposed of at the facility. *Id.* at 3a. Thus, the court reasoned, under CERCLA "the legal structure of ownership" does not insulate from liability a "person" who operates the facility.

Id. at 3a-4a. Furthermore, because CERCLA defines a "person" to include a corporation, § 101(21), 42 U.S.C. 9601(21)), a corporation that operates a facility can be liable even if it does not own that facility. Pet. App. 4a. The court concluded that its "analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA." *Ibid.*

The court of appeals additionally observed that other courts had consistently construed the term "operator" to include corporate officers and shareholders who participate in the operation of a facility. Pet. App. 4a. See *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743-744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985). It concluded that a parent corporation that participates in the operation of a subsidiary's facility is similarly liable. Pet. App. 4a. The court noted that Kayser-Roth relied heavily on the Fifth Circuit's decision in *Joslyn Mfg. Co.* v. *T.L. James & Co.*, 893 F.2d 80 (1990), petitions for cert. pending, Nos. 89-1973 (filed June 18, 1990) & 90-69 (filed June 25, 1990). The court explained that the Fifth Circuit's decision was not apposite:

> The *Joslyn* court framed its issue as whether to "impose direct liability on parent corporations for the violations of their wholly owned subsidiaries." Joslyn, 893 F.2d at 81. On the theory of the case presently under consideration, Kayser is being held liable for its activities as an operator, not the activities of a subsidiary.

Pet. App. 5a.

The court of appeals next examined "whether the district court correctly held that Kayser was an operator." Pet. App. 5a. The court first observed:

> Without deciding the exact standard necessary for a parent to be an operator, we note that it is obviously

> not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary. To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum, it requires active involvement in the activities of the subsidiary.

Ibid. The court reviewed the district court's findings that Kayser-Roth "exerted practical total influence and control over Stamina Mills' operations" (*id.* at 5a-6a) and concluded that "[s]uch control is more than sufficient to be liable as an operator under CERCLA" (*id.* at 7a).

ARGUMENT

Kayser-Roth contends that a parent corporation cannot be held liable under CERCLA for participating in the operation of a subsidiary's facility without first "piercing the corporate veil." Pet. 7, 8, 13, 15. The court of appeals correctly rejected that contention. The court of appeals' decision, which is entirely consistent with CERCLA's language and "the well-settled principle of limited shareholder liability" (*id.* at 7), does not conflict with any decision of this Court or of another courts of appeals. Accordingly, there is no warrant for this Court's review.

1. Kayser-Roth argues that the court of appeals erred in holding it liable for its participation in the operation of the Stamina Mills facility because "a corporate parent may be held directly liable as the 'operat[or]' of a facility owned and operated by one of its subsidiaries only if the corporate veil between the parent and subsidiary may be pierced." Pet. 8. See also *id.* at 7, 13, 15. Petitioner's argument is incorrect under both the plain language of CERCLA and settled principles of corporate law. Moreover, it ignores the

concurrent findings of the lower courts that Kayser-Roth—and not the Stamina Mills subsidiary—exercised "practical total influence and control over Stamina Mills' operations." Pet. App. 5a-6a, 13a.

As the court of appeals explained, CERCLA imposes liability on "any person"—including a corporation—that at the time of disposal of any hazardous substance "owned *or* operated" any facility at which such hazardous substances were disposed of. Pet. App. 3a-4a; see CERCLA §§ 101(21), 107(a)(2), 42 U.S.C. 9601(21), 9607(a)(2). The lower courts determined in this case that Kayser-Roth, which exercised "practical total control over Stamina Mills' operations" (Pet. App. 22a), was therefore liable as the operator of the Stamina Mills facility.[4]

Kayser-Roth principally argues that CERCLA does not impose liability on a parent corporation where—in the course of "routine oversight"—it "supervis[es]" the activities of its subsidiary. Pet. 9, 10, 11.[5] That argument fails to comport with the two lower courts' concurrent factual findings, which this Court normally accepts as correct. See, *e.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Those courts found that Kayser-Roth did not simply "supervis[e]" or conduct "routine oversight" of its subsidiary.

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[4] Kayser-Roth makes much of the fact that it did not hold title to the Stamina Mills facility. Pet. 9. As the court of appeals explained, however, that fact is of no moment because Kayser-Roth is not being held directly liable as an owner. Pet. App. 5a.

[5] See Pet. 9 ("the argument here is that Kayser-Roth, by closely *supervising the actions of its subsidiary*, controlled the operations of the facility") (emphasis in original); *id.* at 10 (Kayser-Roth was held liable "because of its assertedly close relationship with its subsidiary"); *ibid.* ("any involvement by Kayser-Roth occurred in the course of routine oversight of the activities of its subsidiary"); *id.* at 11 ("Congress's failure to include a similar express 'control' standard in the relevant portion of CERCLA weighs strongly against expanding the liability of corporate shareholders.").

Rather, "Kayser-Roth essentially was in charge in practically all of Stamina's operational decisions, including those involving environmental concerns." Pet. App. 13a. The lower courts determined that Kayser-Roth "operated" the facility because it participated in and ultimately made all important "operational decisions."[6]

Kayser-Roth's reliance on the "general rule" that "a corporation and its stockholders are deemed separate entities" (Pet. 9) accordingly is beside the point. Kayser-Roth is not being "held liable for the acts of Stamina Mills and its employees" (*ibid.*). The facts showed that Kayser-Roth itself, through its own employees, effectively operated the facility. Indeed, the court of appeals stated in the clearest possible terms, "Kayser-Roth is being held liable for its activities as an operator, not the activities of a subsidiary." Pet. App. 5a (emphasis in original).[7]

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[6] Both lower courts recognized that "it is obviously not the usual case that the parent of the wholly owned subsidiary is an operator of the subsidiary." Pet. App. 5a; see *id.* at 20a-21a. They concluded, however, that this was not the "usual case." The district court found that "[t]he only autonomy given the officers of Stamina Mills was that absolutely necessary to operate the facility on-site from day to day such as hiring and firing hourly employees and ordering inventory." *Id.* at 14a. Kayser-Roth contends, based on that limited autonomy, that only the now-dissolved Stamina Mills (and presumably its shift supervisors and purchasing agents) should be held liable for clean-up. Pet. 9. The courts below correctly rejected that contention. The person or entity actually "in charge" of a facility cannot escape liability on the ground that subordinates were allowed to exercise some limited measure of discretion. *See, e.g., Shore Realty Corp.*, 759 F.2d at 1052 ("LeoGrande is in charge of the operation of the facility in question, and as such is an 'operator' within the meaning of CERCLA.").

[7] Kayser-Roth's argument that CERCLA normally does not employ a "control" test (Pet. 11-13) is also beside the point. The lower courts did not employ a "control" test; rather, they examined whether "Kayser was an operator." Pet. App. 5a. In any event, Kayser-Roth's argument

Kayser-Roth's attempt to hide behind its subsidiary's "corporate veil" (Pet. 10, 11, 15) is unavailing. The "corporate veil" protects a parent corporation from being "held liable for the acts of its subsidiaries." 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 43, at 729 (rev. 1990). It does not protect the parent corporation from its own activities or those of its employees acting within the scope of their authority.[8] The court of appeals did not "create" this concept as "a new principle of shareholder liability" (Pet. 12, 15). Rather, it applied an established rule of corporate law in the CERCLA context. "It is a well-established rule that a corporation will be held liable for the torts and wrongful acts of its directors, officers, and employees within the scope of their authority." W. Knepper & D. Bailey,

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rests on an incorrect reading of the relevant CERCLA provisions. Kayser-Roth observes that CERCLA's definition of an "owner or operator" includes both "any person owning or operating such facility" and

> in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who *owned, operated or otherwise controlled* activities at such facility immediately beforehand.

§ 101(20)(A), 42 U.S.C. 9601(20)(A) (emphasis added). That latter portion of the definition addresses abnormal situations—such as bankruptcies or foreclosures—where the entity responsible for a facility may not technically hold title to the facility nor actively make operational decisions at the facility. See, *e.g.*, *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550, 1555 (11th Cir. 1990), cert. denied, No. 90-504 (Jan. 14, 1991). The use of the term "control" in that context does not suggest, as Kayser-Roth argues by negative implication (Pet. 12-13), that one who exercises active operational control at a facility is not an operator.

[8] Although the court of appeals found no need to reach the issue (Pet. App. 8a n.11), the district court concluded that there was a sufficient basis, in any event, for "piercing the corporate veil." *Id.* at 23a-25a. See note 2, *supra*.

Liability of Corporate Officers and Directors § 2.11 (4th ed. 1988).[9] Kayser-Roth became an operator of the Stamina Mills facility because its employees, acting within the scope of their authority, took charge of the operation of the Stamina Mills facility. See Pet. App. 6a, 21a-22a.

2. Kayser-Roth incorrectly argues that the court of appeals' decision conflicts with the Fifth Circuit's decision in *Joslyn Mfg. Corp.* v. *T.L. James & Co., supra.* As the court of appeals explained, there is no conflict. The issue in *Joslyn Mfg. Corp.* was whether to "impose direct liability on parent corporations for violations of their wholly-owned subsidiaries." 893 F.2d at 81.[10] In this case, by contrast, "Kayser

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[9] See, *e.g., United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are ultra vires of the corporation."); see also, *e.g.*, 10 *Fletcher Cyclopedia on the Law of Private Corporations* § 4877, at 323 (rev. 1986) ("corporations can commit almost any kind of a tort that individuals can commit, and are liable for the acts of their agents and servants in the same degree as natural persons are liable for the acts of their servants and agents * * *; that is now hornbook law, unless changed by statute"); R. Stevens, *Handbook on the Law of Private Corporations* 359 (2d ed. 1949) ("In applying the doctrine of respondeat superior to any master, corporate or noncorporate, the fundamental question is whether the servant acted within the actual or apparent scope of his employment.").

[10] The Fifth Circuit repeatedly framed the question, and its answer, in those terms. See also 893 F.2d at 82 ("Joslyn urges this court to read CERCLA's definition of 'owner or operator' liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute."); *ibid.* ("Joslyn asks this court to rewrite the language of the Act significantly and hold parents directly liable for their subsidiaries' activities."); *ibid.* ("CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries."); *id.* at 83 ("Congress is quite capable of creating statutes that hold shareholders or controlling entities liable for the acts of valid corporations."); *ibid.* ("Similarly, La. Rev. Stat. Ann. Section 30:2276

BEST AVA

is being held liable for *its* activities as an operator, not the activities of a subsidiary." Pet. App. 5a (emphasis in original).

Kayser-Roth observes that the United States, participating as amicus curiae in *Joslyn Mfg. Corp.*, suggested that the Fifth Circuit consider whether the parent corporation in that case was liable based on the parent corporation's own activities. Pet. 16-17. The Fifth Circuit, however, did not address that theory of liability. As we have explained in our response to the Court's invitation for the views of the United States in *Joslyn Mfg. Corp.*, the Fifth Circuit apparently declined to consider the government's theory because the parties did not squarely present it and because the record developed in the district court would not support it. See Brief for the United States as Amicus Curiae in *Joslyn Mfg. Corp.* v. *T.L. James Corp.*, Nos. 89-1973 & 90-69, at 9-12. The Fifth Circuit's failure to address that theory obviously does not create a conflict among the courts of appeals. *Id.* at 10-11.[11]

3. Kayser-Roth also contends that this Court should grant its petition "to eliminate the disruptive effects

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(West 1989 Supp.) does not impose direct liability on parent corporations for the acts of their subsidiaries.").

[11] Kayser-Roth asserts that "the question here plainly would have been decided the opposite way had this case arisen in the Fifth Circuit." Pet. 17. We disagree. The Fifth Circuit did not foreclose the possibility of holding a parent corporation liable based on the parent corporation's own acts, nor did it disagree with the district court's statements that the parent would be liable if it had been "actively involved" in its subsidiary's operations. See *Joslyn Mfg. Corp.* v. *T.L. James & Co.*, 696 F. Supp. 222, 232 n.20 (W.D. La. 1988). See also *Riverside Market Devel. Corp.* v. *International Bldg. Products*, No. 88-5317 mem. op. (E.D. La. May 23, 1990) (1990 WL 72249, *3-*4) ("If, as in the cases cited by Judge Stagg, [a shareholder] personally participated in the disposal of hazardous wastes, then he may be liable for the wrongful acts of the corporation even under Judge Stagg's Joslyn opinion.").

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flowing from the confusion that now plagues both the courts and the business community with respect to this important question." Pet. 19. The courts, however, have uniformly held—without violence to "the traditional principle of limited liability" (*ibid.*)—that a shareholder who actually participates in the operation of a facility can be held liable under CERCLA on the basis of that participation. See *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d at 743-744; *Shore Realty Corp.*, 759 F.2d at 1045. That is exactly what the court of appeals held in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

ANNE S. ALMY
BRADLEY M. CAMPBELL
Attorneys

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REPLY BRIEF FOR THE PETITIONER

ANDREW J. PINCUS
Counsel of Record
KATHERINE J. HENRY
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

DEMING E. SHERMAN
Edwards & Angell
2700 Hospital Trust Tower
Providence, RI 02903
(401) 274-9200

Counsel for Petitioner
Kayser-Roth Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONER

The government acknowledges (Br. in Opp. 8) that the certiorari petition presents a clean legal issue—whether a parent corporation's control of its subsidiary's operations subjects the parent to liability under CERCLA only when the applicable "piercing the corporate veil" standard is satisfied. The government contended, and the First Circuit held, that CERCLA imposes "direct" liability on a parent corporation even if the corporate veil between parent and subsidiary may not be pierced.

The government nonetheless opposes certiorari on two grounds. First, it tries to disguise the conflict between the decision below and the Fifth Circuit's

decision in the companion case now pending before this Court. But the very text of the two opinions, and the government's own filings in the cases, eliminates any doubt that the decisions squarely conflict. Second, the government tries to support the First Circuit's decision on the merits. In view of the conflict in the lower courts and the importance of the issue, however, those arguments provide no reason for this Court to deny certiorari. Moreover, the government points to nothing in the statute or its legislative history showing that Congress intended the dramatic expansion of shareholder liability effected by the decision below. Review by this Court is clearly warranted.

A. The Government's Strained Reading Of The Fifth Circuit's *Joslyn* Decision Is Wholly Implausible.

We argued in the petition (at 15-17) that certiorari is warranted because the decision below squarely conflicts with the Fifth Circuit's decision in *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), petitions for cert. pending, 59 U.S.L.W. 3058 (U.S. July 24, 1990) (No. 89-1973) & 59 U.S.L.W. 3077 (U.S. Aug. 7, 1990) (No. 90-69). We also showed (Pet. 18-19) that the issue presented in the petition will arise in large numbers of cases and has important practical implications for the business community.

The government does not dispute that the issue presented here is an important one. Its contention (Br. in Opp. 12-13) is that certiorari is not warranted because there is no conflict between this case and *Joslyn*. According to the government, Kayser-Roth was held liable " 'for *its* activities as an operator, not the ac-

tivities of a subsidiary,' " (Br. in Opp. 13 (quoting Pet. App. 5a (emphasis in original))); *Joslyn*, the government continues, did not address the theory of liability endorsed by the First Circuit, but held only that parent corporations are not automatically liable for the acts of their subsidiaries. (This position is fleshed out in the Solicitor General's *amicus* brief in *Joslyn* at pages 10-12.) The government's desire to minimize the scope of its loss is understandable, but *Joslyn* plainly rejected the very legal rule adopted by the court below.

At the outset, despite the government's hints to the contrary (Br. in Opp. 10), the courts below did not hold Kayser-Roth liable for the direct acts of its employees. Instead, they premised liability on the finding that " 'Kayser-Roth . . . exerted practical total influence and control over Stamina Mills' operations.' " Pet. App. 6a (citation omitted). In particular, the court of appeals noted that Kayser-Roth's "control included environmental matters," pointing to the district court's finding that Kayser-Roth " 'had the power to control,' " " 'the power to direct,' " " 'the ultimate ability to prevent,' " and " ' was able to direct' " various Stamina Mills activities. *Ibid.* (citation omitted). The court of appeals found "[s]uch control" sufficient to establish CERCLA liability. *Id.* at 7a.

In *Joslyn*, the Fifth Circuit flatly rejected this approach. To begin with, the government properly acknowledges (Br. in Opp. 13) that the Fifth Circuit was presented with the contention that a parent corporation's control over its subsidiary's operations may support liability, but the government erroneously asserts that this argument appeared only in the government's *amicus* brief. The party supported by the

government—Joslyn Manufacturing Company—also contended that the defendant should be held directly liable under CERCLA because it controlled the operations of its subsidiary. See Joslyn Mfg. Co. C.A. Reply Br. 19-20. Indeed, Joslyn took pains to demonstrate that its position was "fully consistent" with the one put forth by the government. *Id.* at 19. See also Powerline Supply Co. C.A. Reply Br. 7 (arguing that the defendant was liable because of its "direct" involvement in its subsidiary's activities).

The language of the Fifth Circuit's decision establishes beyond any doubt that the court considered and rejected the government's position. The court made clear that CERCLA does not make "controlling entities liable for the acts of valid corporations." 893 F.2d at 83. To the contrary, the court flatly held that, in a CERCLA suit, the "criteria for analyzing the issue of 'control' in the parent/subsidiary context" are those that govern piercing the corporate veil. *Ibid.* Certainly, after pressing its "control test"—and having it rejected—it ill behooves the government now to contend that the question of that test's validity was not properly before the court in *Joslyn*.

Moreover, the *Joslyn* opinion contains additional indisputable evidence of the broad scope of the ruling. At the outset of its opinion, the Fifth Circuit cited a number of decisions and explicitly "decline[d] to" follow them. *Ibid.* *Not one* of those cases involved the narrow issue that the government now contends is all that was decided in *Joslyn*—whether a subsidiary's liability should automatically be imputed to its parent corporation. Rather, these cases *all* appear in the government's *amicus* brief, cited in support of the theory of "direct" parent liability that is at issue here; most of the decisions squarely adopt

that legal standard. Indeed, several of these same cases were expressly endorsed by the First Circuit in the decision below (see Pet. App. 4a).

For example, the Fifth Circuit refused to follow *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), a decision extensively relied on by the government in its *amicus* brief in *Joslyn* (see C.A. Am. Br. 16, 17, 21, 22), its brief in the First Circuit in this case (C.A. Br. 22-24), and its brief in opposition in this Court (at 10 n.6, 14). Similarly, the district court decisions expressly rejected by the Fifth Circuit—*Idaho* v. *Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986); *Colorado* v. *Idarado Mining Co.*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20578 (D. Colo. 1987); and *Vermont* v. *Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988); were prominently featured in the government's *amicus* brief before that court. Am. Br. 21-22; see also *id.* at 19 n.11 (citing *United States* v. *Mottolo*, 605 F. Supp. 898 (D.N.H. 1985), another decision rejected by the Fifth Circuit).

In sum, it would be difficult to draft a more express rejection of the government's theory.[1] The Fifth

[1] The Solicitor General argues in the *amicus* brief filed in this Court in *Joslyn* that the Fifth Circuit did not reject the standard of liability set forth in these decisions, but merely found that principle inapplicable on the facts of the case. No. 89-1973 Am. Br. at 11-12. That assertion is, to say the least, strained. As we have discussed, we read *Joslyn* expressly to reject the government's contention. Moreover, if the Fifth Circuit had meant to leave the legal question open for another day, it surely would have said so rather than couching its decision in terms that foreclose the issue. Finally, the Solicitor General's conclusion rests on a clear misreading of the district court's opinion in *Joslyn*. The district court rejected the legal standard that the government advocated

Circuit examined the decisions that the government advanced in support of its theory of liability and expressly disagreed with the result in those cases. The First Circuit, by contrast, expressly endorsed those very same decisions. Pet. App. 4a (citing *Shore Realty* and *Bunker Hill*). The decision in *Joslyn* thus squarely conflicts with the First Circuit's decision in this case.[2]

B. The Decision Below Is Not Based On Traditional Standards Of Corporate Liability.

Much of the government's discussion of the merits (Br. in Opp. 8-12) is irrelevant. For example, the government seeks to justify the decision below by

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in the court of appeals. 696 F. Supp. at 224-226. Later in its opinion, the district court reaffirmed that determination, noting that, if the facts of the case had been different, liability might attach under *common law* principles. See *id.* at 232-233 n.20. Significantly, the government's brief before the Fifth Circuit in *Joslyn* forthrightly acknowledged the district court's determination, stating that "[t]he district court in the instant case has apparently rejected this theory of direct liability, because the court viewed it as significantly reducing the protection that parent corporations otherwise are accorded by the doctrine of the corporate veil." Am. Br. at 22 (citing 696 F. Supp. at 224 & n.4).

[2] The government persists (Br. in Opp. 13 n.11) in misconstruing the decision in *Riverside Market Development Corp.* v. *International Building Products*, No. 88-5317, 1990 U.S. Dist. LEXIS 6375 (E.D. La. May 23, 1990). The passage cited by the government is expressly addressed to the liability of corporate *officers*, not the liability of shareholders. Slip op. at *11; see also Pet. 17 n.12. The government has simply inserted the term "a shareholder" into a sentence discussing the defendant's liability as an officer. As we explain in the petition (at 14-15) the two situations involve completely different legal principles.

reference to the facts, arguing that Kayser-Roth may be held liable because "it participated in and ultimately made all important 'operational decisions.'" Br. in Opp. 10. But the petition does not seek review of the lower courts' factual findings regarding the extent of Kayser-Roth's involvement in the affairs of its subsidiary. Rather, the question is the legal standard against which those facts are to be measured; specifically, whether Congress intended to impose liability on parent corporations that "control" their subsidiaries' operations without regard to whether the corporate veil between parent and subsidiary may be pierced.

The remainder of government's argument rests on another fallacy: the contention that Kayser-Roth was held liable for its own acts, not for the acts of its subsidiary, Stamina Mills. Kayser-Roth did not itself operate the facility. Instead, as we explain above, it was held liable because it was found to *control* Stamina Mills' operation of the facility. See Pet. App. 5a-6a.

Numerous decisions establish that the piercing the corporate veil doctrine addresses the precise question presented in this case: when does the parent's control of its subsidiary's affairs reach the point that the parent and the subsidiary should be treated as one. See generally 1 *Fletcher Cyclopedia of the Law of Private Corporations* §§ 25, 43 (1990). Under the court of appeals' approach, veil-piercing would not be necessary in any context because it always would be possible to hold a parent that exercises control over a subsidiary "directly" liable for the parent's "own" acts. In fact, however, veil-piercing rules are applied universally to determine whether a parent should be

held liable due to its control over a subsidiary. As we discuss in the petition (at 8-15), Congress plainly did not intend to overturn that well-settled limit on shareholder liability.[3]

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
KATHERINE J. HENRY
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

DEMING E. SHERMAN
Edwards & Angell
2700 Hospital Trust Tower
Providence, RI 02903
(401) 274-9200

Counsel for Petitioner
Kayser-Roth Corporation

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[3] The government half-heartedly puts forth (Br. in Opp. 10-11 n.7) an alternate reading of the statutory language. But the Fifth Circuit declined to read the statute in the manner suggested by the government. Moreover, the government's argument fails to come to grips with the settled rule, also applied by the Fifth Circuit in *Joslyn*, that such a dramatic expansion in shareholder liability must rest on express statutory language.